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2 The following constitutes the Memorandum Decision of  
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The following constitutes the Memorandum Decision of  
the Court. Signed: August 17, 2022

Roger L. Efremsky  
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF CALIFORNIA, OAKLAND DIVISION

In re  
PACIFIC STEEL CASTING COMPANY LLC  
Debtor,

Case No. 19-40193-RLE  
Chapter 7

SARAH L. LITTLE, Chapter 7 Trustee  
Plaintiff,

Adversary Proceeding  
No. 19-4057-RLE

v.

SPEYSIDE FUND, LLC, a Delaware limited  
liability company, et al.,

Defendants.

Memorandum Decision re Speyside Defendants' Motion for Partial  
Summary Judgment and Trustee's and Second Street's Joint Motion  
for Partial Summary Judgment

I. Introduction

In 2014, Second Street Properties, f/k/a Pacific Steel

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1 Casting Company ("Second Street") and its wholly owned subsidiary  
2 Berkeley Properties, LLC ("Berkeley Properties") filed chapter 11  
3 cases. At the time, Second Street had a collective bargaining  
4 agreement (the "CBA") with its union employees and participated  
5 in a multiemployer pension plan ("Local 164B" and the "MEP"). The  
6 court approved Second Street's sale of its steel foundry business  
7 to a new entity referred to here as Pacific Steel or the Debtor.

8 The sale was documented by an asset purchase agreement (the  
9 "APA") which was structured to comply with ERISA §4204 so that  
10 Second Street could avoid paying the large withdrawal liability  
11 to the MEP that it otherwise faced, then estimated to be between  
12 \$20 million and \$27 million (the "Contingent Withdrawal  
13 Liability"). To take advantage of this special treatment, ERISA  
14 required both parties to the transaction to do certain things. As  
15 buyer, Pacific Steel had to post and maintain a bond payable upon  
16 default to the MEP and perform in a certain manner for the five  
17 pension plan years following the sale - the contingency period.  
18 As seller, Second Street had to provide a deed of trust on the  
19 real property owned by its wholly owned subsidiary. Second  
20 Street's chapter 11 plan was also structured to comply with these  
21 provisions and to satisfy the concerns of the trustees of the MEP  
22 (the "MEP Trustees").

23 Before the contingency period had elapsed, Pacific Steel  
24 failed to maintain the conditions for eliminating the Contingent  
25 Withdrawal Liability. Pacific Steel later stopped contributing to  
26 the MEP and then filed this chapter 7 case.

27 The chapter 7 trustee for Pacific Steel's estate (the  
28 "Trustee") has sued the Speyside Defendants - former owners and

1 managers of Pacific Steel - alleging, in brief, that (1) under  
2 the APA, Pacific Steel agreed to either assume the Contingent  
3 Withdrawal Liability or to indemnify Second Street for it; and  
4 (2) Pacific Steel's financial statements failed to properly  
5 account for the Contingent Withdrawal Liability, in effect  
6 concealing the fact that it was insolvent from inception, and  
7 inflated the value of its inventory. These theories are the  
8 factual premise for each of the Trustee's fraudulent transfer and  
9 breach of fiduciary duty claims.

10 **II. The Competing Motions for Partial Summary Judgment**

11 Before the court are competing motions for summary judgment  
12 that turn on the interpretation of the APA.

13 **A. The Speyside Motion**

14 The Speyside Fund LLC ("Speyside"), the Alcast Company,  
15 Krishnan Venkatesan, Jeffrey Stone, Eric Wiklendt, Jerry Johnson,  
16 Brian Holt, Steve Wessels, RataxasCo LLC, Speyside Equity LLC,  
17 Kevin Daugherty, individually and as Trustee of the TD 2011 Trust  
18 and the PD 2011 Trust, and Robert C. Sylvester (collectively, the  
19 "Speyside Defendants") have filed their Motion for Partial  
20 Summary Judgment as to Fact of Liability (the "Speyside Motion").  
21 Docket Nos. 176-183.

22 The Speyside Motion is directed at the following claims  
23 alleged in the First Amended Complaint. Docket No. 70 (the  
24 "FAC"):

25 The second claim for breach of the fiduciary duty owed to  
26 Pacific Steel against Krishnan Venkatesan, Jeffrey Stone, Jerry  
27 Johnson, Brian Holt, Steve Wessels, and Kevin Daugherty  
28 (identified in the FAC as the Management Defendants).

1       The seventh claim for avoidance of four-year intentionally  
2 fraudulent transfers against Speyside, the Alcast Company,  
3 Krishnan Venkatesan, Jeffrey Stone, Eric Wiklendt, RataxasCo LLC,  
4 Speyside Equity LLC, Kevin Daugherty, the TD 2011 Trust, the PD  
5 2011 Trust, and Robert C. Sylvester (identified in the FAC as the  
6 Owner Defendants).

7       The eighth claim for avoidance of four-year constructively  
8 fraudulent transfers against the Owner Defendants.

9       The ninth claim for avoidance of seven-year intentionally  
10 fraudulent transfers against the Owner Defendants.

11       The eleventh claim for recovery of the four-year and seven-  
12 year avoided transfers against the Owner Defendants.

13       The fourteenth claim for aiding and abetting breach of  
14 fiduciary duty by the Management Defendants against the Owner  
15 Defendants.

16       The Trustee seeks compensatory damages of \$40 million for  
17 the breach of fiduciary duty claims and recovery of \$14 million  
18 in allegedly fraudulent transfers.

19       The Speyside Motion is made on the grounds that the Trustee  
20 cannot meet her burden of proof with respect to these claims  
21 because the underlying premise for each of them is fatally  
22 flawed. Each of these claims requires proof that, under the APA,  
23 Pacific Steel became obligated to pay the Contingent Withdrawal  
24 Liability owed by Second Street to the MEP - either directly,  
25 because it was assumed, or by agreeing to indemnify Second Street  
26 for it. The Speyside Defendants argue that Pacific Steel has no  
27 such obligation to the MEP or to Second Street under the proper  
28 interpretation of the APA and this liability belongs to Second

1 Street.

2       The Speyside Motion is supported by Declarations of Todd  
3 Toral, Jeffrey Stone, Kevin Daugherty, and Israel Goldowitz.  
4 Docket Nos. 180-183. The Trustee and Second Street have filed a  
5 Joint Opposition supported by the Declaration of Jessica  
6 Bagdanov. Docket Nos. 195, 199. They have also objected to  
7 evidence in the supporting declarations of Jeffrey Stone, Kevin  
8 Daugherty, and Israel Goldowitz. Docket Nos. 196-198. The  
9 Speyside Defendants have filed a Reply. Docket No. 208.<sup>1</sup>

10      **B. The Trustee's and Second Street's Joint Motion**

11      The Trustee and Second Street have filed their Joint Motion  
12 for Partial Summary Judgment Regarding Pacific Steel's Assumption  
13 of Second Street's Contingent Withdrawal Liability (the "Joint  
14 Motion"). Docket Nos. 172-174.

15      The Joint Motion argues that the Trustee's and Second  
16 Street's interpretation of the APA is the only reasonable one.  
17 They claim that the APA obligated Pacific Steel to pay Second  
18 Street's Contingent Withdrawal Liability. They contend that this  
19 obligation rendered Pacific Steel insolvent at all relevant times  
20 and Pacific Steel failed to properly account for this liability  
21 on its financial statements. Because of this, the distributions  
22 made by Pacific Steel to the Speyside Defendants were fraudulent

23  
24  
25      <sup>1</sup> The Trustee's and Second Street's objection to the Speyside  
26 Defendants' evidence is overruled. The Stone and Daugherty  
27 Declarations do not offer legal conclusions, nor are they clearly  
28 and unambiguously inconsistent with their deposition testimony  
and thus are not "sham" declarations. They also provide  
appropriate context. The Goldowitz Declaration and report are  
proper rebuttal testimony.

1 transfers or the Speyside Defendants breached their fiduciary  
2 duties in enabling these transfers to be made. They also urge the  
3 court to find that the doctrines of judicial and equitable  
4 estoppel bar the Speyside Defendants from claiming that Pacific  
5 Steel did not agree to assume or to indemnify Second Street for  
6 the Contingent Withdrawal Liability. The Joint Motion is  
7 supported by the Declaration of Jason Komorsky. Docket No. 174.  
8 The Speyside Defendants have filed Opposition to the Joint  
9 Motion. Docket No. 203. The Trustee and Second Street have filed  
10 a Reply. Docket No. 205.

11 **III. Background Facts**

12 The Speyside Defendants, the Trustee and Second Street refer  
13 to and rely on the following background events and documents. As  
14 necessary for context, the court takes judicial notice of certain  
15 documents filed in the Second Street chapter 11 case and the  
16 docket in the chapter 7 case of Pacific Steel and this adversary  
17 proceeding.

18 **A. Second Street's 2014 Bankruptcy Case**

19 Second Street manufactured steel castings at its plant in  
20 Berkeley, California. Berkeley Properties owned the real property  
21 on which Second Street operated. Many of Second Street's former  
22 employees were represented by Local 164B, operating under the CBA  
23 pursuant to which Second Street contributed to the MEP.

24 In March 2014, Second Street and Berkeley Properties filed  
25 their jointly administered chapter 11 cases (Case Nos. 14-41045  
26 and 14-41048). In its list of the twenty largest unsecured  
27 creditors, Second Street identified the MEP as having a \$27  
28 million contingent and unliquidated claim for Second Street's

1 withdrawal liability. Second Street Docket No. 1 at 4.

2 Second Street retained an investment banker to help it find  
3 a purchaser for its steel foundry business. Second Street Docket  
4 No. 157. Speyside was contacted as a potentially interested  
5 party. Docket no. 181, Stone Dec., Ex. 5 (2/24/24 summary from  
6 investment banker). Speyside submitted an initial indication of  
7 interest. *Id.* Ex. 7. The investment banker informed Speyside that  
8 participation in the MEP was a condition to purchasing the Second  
9 Street foundry business. *Id.* Ex. 8. After a period of  
10 negotiation, Speyside and Second Street signed the APA. Docket  
11 No. 180, Toral Dec., Ex. F, APA.

12 During these negotiations, counsel for the MEP provided a  
13 memo to its Trustees and Second Street's chapter 11 counsel  
14 regarding Second Street's withdrawal liability as it affected  
15 potential purchasers of Second Street's foundry business. Docket  
16 No. 180, Toral Dec., Ex. E, 5/1/14 memo re pension plan  
17 withdrawal liability issues "helpful to a potential purchaser  
18 assessing a potential transaction". This analysis necessarily  
19 informed Second Street's understanding of this issue for the  
20 drafting of the APA and Second Street's Chapter 11 Plan.

21 This memo explained the withdrawal liability issue as  
22 follows:

23 First, Second Street's share of the MEP's unfunded vested  
24 liabilities was approximately \$27 million which would become due  
25 in installments if Second Street withdrew from the MEP. The  
26 actual present value of this was approximately \$20 million due to  
27 special rules limiting a withdrawing employer's liability.

28 Second, ERISA §4204 provided a special rule that, subject to

1 certain conditions, would allow Second Street to sell its  
2 business and be exempt from paying the withdrawal liability that  
3 otherwise arose as a result of such a sale. These included, (1) a  
4 buyer obligates itself to contribute to the MEP on terms similar  
5 to Second Street's; (2) a buyer obligates itself to pay whatever  
6 withdrawal liability Second Street would have paid based on the  
7 year of the sale and the four preceding years but has no  
8 obligation to assume seller's full withdrawal liability under  
9 §4204, only that portion that relates to the last five years of  
10 operations estimated at \$8 million; (3) a buyer posts and  
11 maintains a surety bond for the five plan years after the sale,  
12 estimated to be in the amount of \$1.4 million; (4) if a buyer  
13 withdraws during the first five years after the sale, and does  
14 not timely pay its own withdrawal liability, then Second Street  
15 must be contractually and secondarily liable for the withdrawal  
16 liability that it would have incurred for the years a buyer  
17 participated in the plan; (5) if a buyer withdraws during the  
18 five plan years after the sale and does not timely pay its own  
19 withdrawal liability, then Second Street would be statutorily  
20 liable to pay the withdrawal liability Second Street would have  
21 had "but for the operation of ERISA §4204 (e.g., \$20 million);"  
22 (6) if Second Street were to be liquidated or its assets  
23 distributed after such a sale, it must post and maintain a bond  
24 equal to the amount of its withdrawal liability for the five  
25 years after the sale; and (7) if all these conditions are met,  
26 Second Street "will escape all withdrawal liability if a §4204  
27 sale occurs, the conditions of the rule are met, and buyer  
28 remains in the plan and current with its own contributions

1 through the close of the fifth plan year." Docket no. 180, Toral  
2 Dec., Ex. E, 5/1/14 MEP Trustee Memo at 2-3.

3 The MEP Trustees filed a proof of claim in Second Street's  
4 bankruptcy case (the "Local 164B Claim"). Docket No. 180, Toral  
5 Dec., Ex. C. The Local 164B Claim attached a memo dated June 20,  
6 2014 from The Segal Company, the MEP's actuary, stating that (1)  
7 \$26.7 million was an estimate of Second Street's withdrawal  
8 liability assuming a complete withdrawal from the MEP during the  
9 plan year ending June 30, 2014; (2) this liability could be paid  
10 in quarterly installments the number of which is limited to a  
11 maximum of 20 years by ERISA; (3) the annual payment for a  
12 withdrawal in the 2013-2014 plan year was \$1.865 million; (4) the  
13 \$26.7 million net assessment would not be fully amortized at this  
14 rate and ERISA's 20-year limitation would apply reducing the net  
15 assessment of \$26.7 million to its present value of \$21.1  
16 million. See Ex. A to Local 164B Claim.

17 **B. The Bidding Procedures and the Sale Process**

18 On June 19, 2014, Second Street filed a Motion to Approve  
19 Overbid Procedures and Related Relief (the "Bid Procedures  
20 Motion"). Second Street Docket No. 201. Speyside's bankruptcy  
21 counsel reviewed the language in the Bid Procedures Motion before  
22 it was filed and requested certain changes which Second Street's  
23 bankruptcy counsel agreed to make. Docket No. 174, Komorsky Dec.,  
24 Ex. 27, 6/8/14 email from counsel with suggested revisions. The  
25 initial version of the Bid Procedures Motion stated that under  
26 the APA, Speyside's bid was "\$11.3 million in cash for certain  
27 assets." The language Second Street agreed to add at Speyside's  
28 request after that phrase was:

1 plus assumption of certain liabilities (collectively, the  
2 "Assumed Liabilities"), including (i) [Second Street's]  
3 multiemployer pension plan with contingent liability  
4 estimated at \$27.8 million; (ii) [Second Street's] nonunion  
5 pension plan, with liability estimated at \$2.2 million;  
6 (iii) specified accounts payable aggregating \$2 million;  
7 (iv) specified accrued expenses for customer rebates and  
8 goods/materials aggregating \$1 million; and (v) a lease of  
9 real property with [Berkeley Properties], providing for rent  
10 payments aggregating approximately \$16 million.

11 Second Street Docket No. 201.

12 The court entered an order approving the Bid Procedures  
13 Motion and thereafter approved the sale to Pacific Steel, as  
14 assignee of Speyside. Second Street Docket Nos. 220, 225, and  
15 269. The sale closed on August 29, 2014.

16 **C. The Asset Purchase Agreement**

17 Certain provisions of the APA are critical to the issues  
18 raised by these competing motions. Docket No. 180, Toral Dec.,  
19 Ex. F, APA. First, the APA is a fully integrated contract to  
20 which California law applies. See §10.03, APA supersedes any  
21 prior understandings, agreements, representations by or between  
22 parties that relate in any way to its subject matter; §10.09, APA  
23 governed by California law and where applicable the Bankruptcy  
24 Code.

25 Section 2.03 is entitled "Liabilities." Section 2.03(a)  
26 begins:

27 Other than the Assumed Liabilities, Buyer shall not assume  
28 or agree to pay, perform or discharge, any debts,  
liabilities ... or commitments of any kind or character,  
whether accrued or fixed, absolute or contingent, matured or  
unmatured or determined or undetermined (collectively,  
"Liabilities").

Section 2.03(b) defines the Assumed Liabilities as follows:

At closing Buyer shall assume from Seller (and pay, perform,  
discharge, and otherwise satisfy in accordance with their  
respective terms) the following liabilities (the "Assumed

Liabilities") . . .

(ii) all Liabilities of Seller arising under the Assumed Contracts to the extent that such Liabilities first accrue on or after the Closing Date...;

(iii) the obligations to administer or to provide benefits [...] under the Benefit Plans that Buyer assumes as listed on Schedule 2.03(b)(iii) (the "Assumed Plans") after the Closing Date, and all Liability arising from Buyer's termination of or withdrawal from any Assumed Plan ...

Section 2.04 is entitled "Assumption of Contracts; Cure Amounts." This section deals with the assumption of certain executory contracts by Second Street and their assignment to Pacific Steel. Schedule 2.04 lists the CBA as an Assumed Contract.

Section 7.10(a) is entitled "Multiemployer Plan." It provides in relevant part:

(a) The Parties intend to comply with the requirements of Section 4204 of the Employment Retirement Income Security Act of 1974, as amended ("ERISA") in order to ensure that the transactions contemplated by this Agreement shall not be deemed a complete or partial withdrawal from [the Multiemployer Plan]. Accordingly, Seller and Buyer agree:

(i) After the Closing Date, Buyer shall contribute the same number of contribution base units for which Seller had an obligation to contribute.

(ii) Buyer shall provide to the Multiemployer Plan, for a period of five consecutive plan years commencing with the first plan year beginning after the Closing Date, either a bond issued or an amount held in escrow ...

(iii) If Buyer completely or partially withdraws from the Multiemployer Plan prior to the end of the fifth plan year ... and Buyer's liability ... with respect to the Multiemployer Plan is not paid, then Seller shall be secondarily liable for any withdrawal liability Seller would have had to the Multiemployer Plan with respect to Buyer's operations during such five-year period but for Section 4204 of ERISA. Buyer shall indemnify Seller and hold Seller harmless from and against any liability incurred by Seller pursuant to Section 4204 of ERISA and this subsection (iii).

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1                   **D. Second Street's Chapter 11 Plan**

2                   On April 30, 2015, Second Street, Berkeley Properties, and  
3 their Creditors' Committee filed their Second Amended Joint  
4 Chapter 11 Plan of Reorganization (the "Chapter 11 Plan" and the  
5 "Plan Proponents"). Second Street Docket No. 535. The Chapter 11  
6 Plan stated that the Plan Proponents had agreed with the MEP  
7 Trustees on the treatment of Local 164B's Claim. The Chapter 11  
8 Plan provided that (1) on the effective date, the Plan  
9 Administrator shall execute a deed of trust that encumbers the  
10 Berkeley real property (the "Deed of Trust") to secure payment of  
11 the Local 164B Claim; (2) if Pacific Steel had not withdrawn from  
12 Local 164B before July 1, 2020, or if it had withdrawn and  
13 completely satisfied all resulting withdrawal liability  
14 obligations to Local 164B, then the Deed of Trust would be  
15 reconveyed; (3) if Pacific Steel withdrew before July 1, 2020,  
16 Local 164B would deliver notice to the Plan Administrator with  
17 its calculation of Second Street's withdrawal liability under  
18 ERISA §4204; (4) thereafter, only the Plan Administrator could  
19 contest Local 164B's calculation of the amount of Second Street's  
20 withdrawal liability that may have been triggered in accordance  
21 with ERISA §4219(b) and §4221; (5) if the "withdrawal liability  
22 is uncontested and/or confirmed" through ERISA's dispute  
23 resolution procedures, the Local 164B Claim "shall be an Allowed  
24 Claim;" (6) if Pacific Steel withdrew prior to July 1, 2020 and  
25 failed to make any withdrawal liability payment, and Pacific  
Steel or the Plan Administrator failed to cure it, then Local  
164B was entitled to exercise any and all remedies available to  
it under the Deed of Trust; and (7) the Chapter 11 Plan's

1 provisions regarding the Deed of Trust were the sole source of  
2 recovery for the Local 164B Claim and the Deed of Trust satisfied  
3 Second Street's requirement to post a bond under ERISA  
4 §4204(a)(3).<sup>2</sup> Second Street Docket No. 535, Chapter 11 Plan, §VI.  
5 D.

6 Second Street, its Creditors' Committee, and the MEP  
7 Trustees also entered into a stipulation regarding the treatment  
8 of the Local 164B Claim (the "Stipulation"). Second Street Docket  
9 No. 559. The Stipulation recited that it was intended to clarify  
10 what was perceived to be an ambiguity in the Chapter 11 Plan's  
11 treatment of the Local 164B Claim and its rights under the Deed  
12 of Trust. The Stipulation (1) defined Pacific Steel's failure to  
13 post the bond required for §4204 treatment by the June 30, 2015  
14 deadline as a "Buyer's Withdrawal;" (2) stated the Chapter 11  
15 Plan was to be construed so that Local 164B's rights and remedies  
16 "upon the triggering of withdrawal liability under ERISA, applied  
17 to a Buyer Withdrawal;" and (3) the rights of the Second Street  
18 Plan Administrator applied to a Buyer Withdrawal in the same  
19 manner as they would to "any other withdrawal liability  
20 triggered."<sup>3</sup>

21 In June 2015, the court entered an order confirming the  
22

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23 <sup>2</sup>ERISA §4204(a)(3) provides that if substantially all of the  
24 seller's assets are distributed, or it is liquidated before the  
25 end of the 5 year period, then the seller shall provide a bond or  
amount in escrow equal to the present value of the withdrawal  
liability the seller would have had but for this subsection.

26 <sup>3</sup>Second Street's confirmation brief stated that, pursuant to  
27 ERISA, if its case were converted to ch. 7, it would be liable  
28 for the Contingent Withdrawal Liability owed to the MEP. Second  
Street Docket No. 581, ¶25. It is silent as to the APA.

1 Chapter 11 Plan. Second Street Docket No. 589.

2 **E. Pacific Steel's Operations and its Chapter 7 Case**

3 Pacific Steel obtained the bond required for its compliance  
4 with ERISA §4204(a)(1)(B) and contributed to the MEP pursuant to  
5 the CBA which it had assumed under the APA. Pacific Steel  
6 operated the steel foundry business from August 2014 until late  
7 2018.

8 In December 2017, the surety that had provided the bond  
9 canceled it. The MEP Trustees then gave notice to Pacific Steel  
10 and Second Street that this was an event of default ending the  
11 ERISA §4204 exemption and the MEP intended to exercise its rights  
12 under the Deed of Trust. Docket No. 180, Toral Dec., Ex. D,  
13 12/28/17 MEP Trustees' demand letter. This prompted Second Street  
14 to send a demand letter to Pacific Steel stating that the  
15 indemnity obligation under §7.10 of the APA had been triggered.  
16 Docket No. 181, Stone Dec., Ex. 18, 1/23/18 Second Street demand  
17 letter.

18 In January 2019, Pacific Steel filed its chapter 7 case and  
19 the Trustee was appointed. Second Street timely filed its proof  
20 of claim asserting Pacific Steel owed it \$24.2 million on the  
21 grounds that Pacific Steel had agreed to indemnify Second Street  
22 for the Contingent Withdrawal Liability by the APA. Claim 2-1 on  
23 Pacific Steel Claims Register.<sup>4</sup>

24 On November 4, 2019, the Trustee filed the complaint  
25 commencing this Adversary Proceeding and thereafter filed the

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27 <sup>4</sup> The precise amount of the Contingent Withdrawal Liability  
28 is the subject of another motion. Docket Nos. 178, 200, 201, 207.

1 FAC. The Defendants have answered and completed discovery.

2 **IV. Discussion**

3 **A. Summary Judgment Standard**

4 Rule 56 of the Federal Rules of Civil Procedure, applicable  
5 here by Bankruptcy Rule 7056, provides that a party may move for  
6 summary judgment, identifying each claim or defense - or the part  
7 of each claim or defense - on which summary judgment is sought.

8 Fed. R. Civ. P. 56(a). Further, Rule 56(a) provides that the  
9 court shall grant summary judgment if the moving party shows that  
10 there is no genuine dispute as to any material fact and the  
11 moving party is entitled to judgment as a matter of law. Summary  
12 adjudication may be granted as to a single issue of law based on  
13 undisputed facts or a single issue which is part of a larger  
14 claim. *Robi v. Five Platters, Inc.*, 918 F.2d 1439 (9th Cir. 1990)  
15 (summary judgment granted based on application of collateral  
16 estoppel); *Van Curen v. Bank of the West (In re Hat)*, No. 04-  
17 32497, 2007 WL 2580688 (Bankr. E.D. Cal. Sept. 4, 2007) (summary  
18 adjudication granted on issue of perfection of security  
19 interest).

20 Where the moving party has the burden of proof on an issue  
21 at trial, it must affirmatively demonstrate that no reasonable  
22 trier of fact could find other than for it. *Celotex v. Catrett*,  
23 477 U.S. 317, 323 (1986). Where the non-moving party will have  
24 the burden of proof on an issue, the movant need only demonstrate  
25 that there is an absence of evidence to support the claims of the  
26 non-moving party. *Id.* at 324. If the moving party meets its  
27 initial burden, the non-moving party must set forth specific  
28 facts showing there is a genuine issue for trial. *Anderson v.*

1       *Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986).

2           Where the parties have filed cross-motions for summary  
3 judgment, the court evaluates each motion independently, viewing  
4 the non-moving party's evidence in the most favorable light and  
5 giving the non-moving party in each instance the benefit of all  
6 reasonable inferences. *Lenz v. Universal Music Corp.*, 815 F.3d  
7 1145, 1150 (9th Cir. 2016) (quoting *ACLU v. City of Las Vegas*,  
8 333 F.3d 1092, 1097 (9th Cir. 2003)).

9           The motions currently before the court are not styled as  
10 cross-motions but they are in effect cross-motions and the court  
11 has dealt with them as such. With respect to the Speyside Motion,  
12 the court has viewed the Trustee's and Second Street's opposition  
13 evidence in its most favorable light and viewed all reasonable  
14 inferences drawn from this opposition evidence in the same  
15 manner. The converse is also true. With respect to the Joint  
16 Motion, the court has viewed the Speyside Defendants' opposition  
17 evidence and reasonable inferences drawn from it in the most  
18 favorable light.

19           The Speyside Defendants seek summary judgment on the FAC's  
20 fraudulent transfer and breach of fiduciary duty claims on the  
21 grounds that the Trustee's liability theory is fatally flawed  
22 because she cannot meet her burden of proof on the core part of  
23 each of them. They argue their record establishes they are  
24 entitled to judgment as a matter of law because the Trustee and  
25 Second Street misinterpret the APA and misunderstand applicable  
26 law.

27           The Trustee and Second Street seek summary judgment without  
28 pointing to any particular claim alleged in the FAC. Instead,

1 they contend that they are entitled to summary judgment because,  
2 under what they contend is the correct interpretation of three  
3 provisions of the APA and the parties' course of dealing, Pacific  
4 Steel agreed "to assume by way of indemnification" the Contingent  
5 Withdrawal Liability. They also contend that the principles of  
6 judicial and equitable estoppel support summary judgment in their  
7 favor.

8                   **B. Contract Interpretation Principles**

9                   The fundamental goal of contract interpretation is to give  
10 effect to the mutual intent of the parties as it existed at the  
11 time of contracting. *U.S. Cellular Inv. Co. v. GTE Mobilnet, Inc.*, 281 F.3d 929, 934 (9th Cir. 2002); Cal. Civ. Code §1636  
13 (contract is to be interpreted to give effect to mutual intent of  
14 parties as it existed at time of contracting so far as same is  
15 ascertainable). The language of a contract is to govern its  
16 interpretation, if the language is clear and explicit, and does  
17 not involve an absurdity. Cal. Civ. Code §1638. The parties'  
18 intent is to be ascertained from their writing alone if that is  
19 possible. Cal. Civ. Code §1639. The court is to view the entire  
20 contract and give effect to every part of it with each clause  
21 helping to interpret the others. Cal. Civ. Code §1641. If  
22 particular clauses are inconsistent with general clauses, the  
23 particular are to control. Cal. Civ. Proc. Code §1859; *Kashmiri v. Regents of University of California*, 156 Cal.App.4th 809, 834  
25 (2007) (specific promise not to raise fees controls over general  
26 statement that fees may be raised at any time without notice;  
27 interpretation that renders one provision meaningless is to be  
28 avoided).

1       Generally speaking, the execution of a contract supersedes  
2 all negotiations and stipulations concerning its subject matter  
3 which preceded its execution. Cal. Civ. Code §1625. In addition,  
4 as codified in California, the parol evidence rule provides that  
5 the terms of an integrated contract, such as the APA, may not be  
6 contradicted by evidence of a prior agreement but they may be  
7 explained by course of dealing, or course of performance, and  
8 evidence of the circumstances under which the contract was made  
9 or to which it relates may be admissible. Cal. Civ. Proc. Code  
10 §1856. Finally, for the proper construction of a contract, the  
11 circumstances under which it was made, including the situation of  
12 its subject and the parties, may be shown so the court may be  
13 placed in the position of those whose language it is  
14 interpreting. Cal. Civ. Proc. Code §1860.

15       While the parol evidence rule generally prohibits the  
16 introduction of any extrinsic evidence to vary, alter or add to  
17 the terms of an integrated contract, it does not prohibit the  
18 introduction of extrinsic evidence to explain the meaning of a  
19 written contract if the meaning urged is one to which the  
20 contract terms are reasonably susceptible. *Casa Herrera, Inc. v.*  
21 *Beydoun*, 32 Cal.4th 336, 343 (2004). Extrinsic evidence is not  
22 admissible to create ambiguities where none exist and a contract  
23 is not made ambiguous because parties disagree as to its meaning.  
24 *Int'l Bhd. of Teamsters v. NASA Servs., Inc.*, 957 F.3d 1038, 1044  
25 (9th Cir. 2020); *Wei Suen v. Yan*, (*In re Yan*), 381 B.R. 747, 755  
26 (N.D. Cal. 2007) (explaining parol evidence rule, noting  
27 extrinsic evidence especially improper where contract is  
28 integrated).

1       Under California law, when the parties dispute the meaning  
2 of the words used in a contract, the court may first  
3 provisionally receive any proffered extrinsic evidence that is  
4 relevant to prove a meaning to which the language of the contract  
5 is reasonably susceptible. *Pacific Gas & E. Co. v. G.W. Thomas*  
6 *Drayage, etc. Co.*, 69 Cal.2d 33, 39-40 (1968). If, in light of  
7 the extrinsic evidence, the language is reasonably susceptible to  
8 an interpretation urged by one party, the extrinsic evidence may  
9 be admitted to aid the court in interpreting the contract. *Id.*

10       When there is no material conflict in the relevant extrinsic  
11 evidence, the court interprets the contract as a matter of law.  
12 If there is a conflict in the extrinsic evidence, the factual  
13 conflict is to be resolved at trial and summary judgment or  
14 adjudication may not be appropriate. *Lust v. Animal Logic Ent.*,  
15 2021 WL 6618677, at \*5 (C.D. Cal. Aug. 25, 2021).

16       **C. Parties' Positions on the Use of Extrinsic Evidence**

17       The parties agree that the interpretation of the APA will  
18 determine the outcome of these competing motions. The Speyside  
19 Defendants argue that the APA is clear and explicit and extrinsic  
20 evidence need not be considered other than to provide context.  
21 Nevertheless, they claim that if the court does consider it, it  
22 fails to accomplish what the Trustee and Second Street suppose.  
23 Docket No. 203 at 24-33. They also protest that the Trustee and  
24 Second Street want their proffered extrinsic evidence to rewrite  
25 the APA by adding language to reach the result they desire.  
26 Docket No. 176 at 30.

27       The position of the Trustee and Second Street is somewhat  
28 baffling. They claim the APA is clear and unambiguous but they

1 also urge the court to consider their proffered extrinsic  
2 evidence. Docket No. 172 at 2, APA is not ambiguous; *id.* at 21:8-  
3 13, APA clearly provides that Pacific Steel must indemnify Second  
4 Street and competent extrinsic evidence is offered to support  
5 this reasonable interpretation; *id.* at 29:11-15, at a minimum the  
6 language of APA §7.10(a)(iii) is ambiguous and should be informed  
7 by extrinsic evidence. They do not explain how §7.10(a)(iii) of  
8 the APA is ambiguous - if they do in fact contend that it is.  
9 They simply insist their extrinsic evidence shows they are  
10 correct.

11 The Trustee and Second Street urge the court to consider the  
12 following extrinsic evidence: (1) the Bid Procedures Motion and  
13 the Kevin Daugherty Declaration supporting it; (2) the Speyside  
14 letter of intent and the evolution of the offers made by Speyside  
15 and the fact that Speyside became the stalking horse bidder; (3)  
16 the Speyside Defendants' internal discussions regarding the  
17 transaction and the MEP withdrawal liability issues, including  
18 the anticipated chapter 7 filing; (4) the ownership structure for  
19 Pacific Steel adopted by the Speyside Defendants; (5) the  
20 Stipulation regarding the Chapter 11 Plan's treatment of the  
21 Local 164B Claim. Docket No. 172 at 29-35; Docket No. 195 at 20-  
22 25; Docket No. 205 at 22-23; Docket No. 174, Komorsky Dec., Exs.  
23 2, 8, 10, 11, 13-15, 18, 19, 21, 23, 25-29, 31-35, 37-39, 43-46,  
24 48-50, 55, 58;<sup>5</sup> Docket No. 195, Bagdanov Dec.

25 The Trustee's and Second Street's apparent misunderstanding  
26

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27 <sup>5</sup> Several of these exhibits were referred to by counsel at  
28 oral argument rather than these briefs. The court has considered  
them.

1 of California law and their internally inconsistent position on  
2 the need for extrinsic evidence has made this a more difficult  
3 task than it should be. Because their position appears to be that  
4 §7.10(a)(iii) of the APA is ambiguous, the court has  
5 provisionally accepted the extrinsic evidence offered by the  
6 Trustee and Second Street and considered whether it shows a  
7 meaning to which §7.10(a)(iii) of the APA is reasonably  
8 susceptible.

9 The court concludes that the APA is not reasonably  
10 susceptible to the interpretation the Trustee and Second Street  
11 desire: that Pacific Steel agreed to "take on" the Contingent  
12 Withdrawal Liability either directly, by assuming it, or  
13 indirectly, by agreeing to indemnify Second Street for it. (Nor  
14 does their proffered extrinsic evidence establish that Pacific  
15 Steel or the Speyside Defendants are subject to judicial or  
16 equitable estoppel.)

17 The pre-deal negotiations and the offers are simply not  
18 relevant. *Casa Herrera, Inc. v. Beydoun*, 32 Cal.4th 336, 344  
19 (2004) (written contract supersedes communications that preceded  
20 its execution). The Speyside Defendants' pre-deal communications  
21 amongst themselves are also irrelevant; they were not shared with  
22 Second Street or its professionals. *Steller v. Sears, Roebuck &*  
23 *Co.*, 189 Cal.App.4th 175, 184-85 (2010) (undisclosed intent or  
24 understanding of a party is irrelevant). This proffered extrinsic  
25 evidence does not support their contention that Pacific Steel  
26 agreed to "take on" the Contingent Withdrawal Liability in order  
27 to become the stalking horse bidder. See APA §7.02, Bankruptcy  
28 Court Matters; Docket No. 181, Stone Dec., Ex. 15, 5/16/14 email

1 re agreement between buyer and seller to cooperate in obtaining  
2 stalking horse status; Bid Procedures Motion at 16-18, Second  
3 Street explaining that protection of stalking horse bidders is  
4 the price paid for enjoyment of best of both worlds - a  
5 contractually bound purchaser on one hand and potential for  
6 better bids with enhanced benefit to estate on other hand.

7 The language added to the Bid Procedures Motion by  
8 Speyside's counsel merely stated what the court views as an  
9 accurate description - the buyer *was* agreeing to assume the CBA  
10 and participate in the MEP, and there *was* a seller's Contingent  
11 Withdrawal Liability of \$27 million as Second Street's own  
12 schedules showed. There was no "representation" by Speyside in  
13 this language, as the Trustee and Second Street argue, and it was  
14 not designed to chill bidding in the sale process. (If anything,  
15 it appears to have been designed to justify the potential break-  
16 up fee the parties had negotiated. See Bid Procedures Motion at  
17 16.)

18 The ownership structure adopted by the Speyside Defendants  
19 for the Pacific Steel entity reflects risk averse business  
20 planning, it does not show an awareness of a liability and a  
21 design to evade it. See Docket No. 181, Stone Dec., ¶19,  
22 explaining reasons to "adopt legally cognizable deal structures  
23 to prudently manage the risk of potential control group liability  
24 relating to Pacific Steel's potential buyer withdrawal  
25 liability".

26 The court has considered whether this proffered extrinsic  
27 evidence shows the APA is reasonably susceptible to the meaning  
28 urged by the Trustee and Second Street and concludes it does not.

1 If the court had gone beyond provisionally admitting it, the  
2 result would be the same. The court now considers the parties'  
3 respective views on the interpretation of the APA.

4 **D. Section 2.03 of the APA**

5 **1. Section 2.03(a)**

6 Section 2.03(a) of the APA provides:

7 Other than the Assumed Liabilities, Buyer shall not assume  
8 or agree to pay any debts, liabilities, obligations, claims,  
9 expenses, taxes, commitments of any kind of character,  
10 whether accrued or fixed, absolute or contingent, matured or  
unmatured or determined or undetermined (collectively,  
Liabilities) of Seller or become liable to Seller or any  
other Person, for any liabilities of Seller.

11 The Trustee and Second Street argue that this provision  
12 "necessarily provides" an indemnification flowing from Pacific  
13 Steel to Second Street for any Assumed Liability, and if an  
14 Assumed Liability were triggered, Second Street had the right to  
15 seek to have Pacific Steel "protect it" from such an Assumed  
16 Liability. Docket No. 172 at 22. From this starting point, they  
17 contend that whether Pacific Steel agreed to indemnify Second  
18 Street for the Contingent Withdrawal Liability turns on whether  
19 the Contingent Withdrawal Liability "is subsumed" in any of the  
20 subsections of §2.03. *Id.* Oddly, they claim §2.03(b) (ii) deals  
21 with the CBA and §2.03(b) (iii) deals with the MEP but they also  
22 claim there is no redundancy in this.

23 The court disagrees with their interpretation of §2.03(a).  
24 This section does not necessarily provide for any indemnification  
25 for any liability. It merely establishes what is excluded from  
26 the Assumed Liabilities.

27 //

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-23-

2. Section 2.03(b) (ii)

Section 2.03(b)(ii) of the APA provides, "[a]t Closing, Buyer shall assume from Seller (and pay, perform, discharge, and otherwise satisfy...) all Liabilities of Seller arising under the Assumed Contracts to the extent that such Liabilities first accrue on or after the Closing Date..."

The Trustee and Second Street posit that (1) the CBA was an Assumed Contract and the CBA required Pacific Steel to accept and be bound by the terms of the MEP; (2) pursuant to §2.03(b)(ii), Pacific Steel agreed to pay all Liabilities arising under the CBA that accrued post-closing; (3) this necessarily included the Contingent Withdrawal Liability because it accrued in 2017 when the bond was canceled, ending Second Street's ERISA §4204 exemption.

They claim their interpretation is in line with the position of the MEP Trustees as stated in the proof of claim filed in Pacific Steel's case. Docket no. 174, Komorsky Dec., Ex. 49, Proof of Claim 23-2 (\$30 million claim "arises under ERISA and the CBA" and Pacific Steel "became subject to all the terms and conditions of the Trust Agreement establishing the Pension Fund by assuming and entering into the CBA").<sup>6</sup>

In response, the Speyside Defendants point out that the Trustee has vacillated on this point. The FAC relied on this "direct assumption" theory as did the Trustee's first motion for

<sup>6</sup>As originally filed, this claim was for Pacific Steel's own \$6 million withdrawal liability. It was later amended to add \$24 million described as a "pre-acquisition" withdrawal liability "assumed by" Pacific Steel under the APA.

1 summary judgment. *See, inter alia*, FAC ¶12, Pacific Steel  
2 responsible for full amount of withdrawal liabilities in excess  
3 of \$32 million per APA; ¶53, Pacific Steel assumed liability per  
4 APA; Docket No. 83, MSJ at 7-10, Pacific Steel assumed but failed  
5 to account for Contingent Withdrawal Liability of \$27 million and  
6 was primarily liable for it under §7.10 of APA. The Trustee later  
7 disclaimed this theory in her interrogatory responses, stating  
8 that Pacific Steel did not directly assume Second Street's pre-  
9 acquisition withdrawal liabilities, and her prior approach was  
10 based on a mistaken reading of the APA. Docket No. 180, Toral  
11 Dec., Ex. A at 27, "Neither the APA nor any other agreement made  
12 [Pacific Steel] directly liable for the pre-acquisition  
13 withdrawal liabilities. Rather, the obligation remained with  
14 [Second Street] and was secured by the deed of trust. But [Second  
15 Street] protected itself by means of the contractual  
16 indemnification and hold harmless provision...".

17 The Trustee is bound by the more recent description of her  
18 understanding of the APA in her verified interrogatory answers.  
19 Second Street is not so constrained but the Trustee may not  
20 simply ride Second Street's coat-tails on this point.

21 The Speyside Defendants argue that while the CBA was an  
22 Assumed Contract listed on Schedule 2.04(a), the MEP was not. The  
23 CBA only obligated Pacific Steel to contribute to the MEP which  
24 it did. Docket No. 176 at 25. They also argue that the Contingent  
25 Withdrawal Liability does not *arise under* the CBA; it arises  
26 under the provisions of ERISA governing Second Street's  
27 withdrawal from the MEP. Docket No. 203 at 23:11-12. This is  
28 perhaps too fine a distinction and the court notes that the

1 Speyside Defendants also argue that the MEP was assumed. Docket  
2 No. 203 at 28:18-21; Docket No. 181, Stone Dec. ¶8, ¶39.

3 The Trustee's and Second Street's argument regarding  
4 §2.03(b)(ii) is not convincing. The language of §2.03(b)(ii)  
5 itself does not support their expansive interpretation - the  
6 Contingent Withdrawal Liability did not *arise under* an Assumed  
7 Contract and did not *first accrue* after the Closing date. It is  
8 not an Assumed Liability as that term is defined in the APA. The  
9 Contingent Withdrawal Liability had *accrued* before the APA was  
10 signed - i.e., it was properly chargeable to Second Street - but  
11 it was not yet payable because its payment was dependent on a  
12 future event that may never have happened. ERISA §4204 allowed  
13 its payment to be deferred and possibly eliminated. It is not an  
14 Assumed Liability that first accrued post-closing.

15 **3. Section 2.03(b)(iii)**

16 Section 2.03(b)(iii) provides "[a]t Closing, Buyer shall  
17 assume from Seller (and pay, perform, discharge, and otherwise  
18 satisfy...) the obligations to administer or to provide benefits,  
19 ... under the [Assumed Plans] after the Closing Date, and all  
20 Liability arising from Buyer's *termination of or withdrawal from*  
21 any Assumed Plan." Schedule 2.03(b)(iii) lists the "Local 164B  
22 Pension Trust" along with several other benefit plans as Assumed  
23 Plans.

24 The Trustee and Second Street argue that the "ordinary  
25 meaning" of this section is that the MEP was an Assumed Plan and  
26 the Contingent Withdrawal Liability *arose* from the cancellation  
27 of the bond in December 2017 which then eliminated Second  
28 Street's ERISA §4204(a) treatment and "triggered" the Contingent

1 Withdrawal Liability. Docket No. 172 at 25-26. They contend that  
2 the Speyside Defendants want to give a "hyper-technical"  
3 interpretation to the "indemnification obligation" in this  
4 section by reading ERISA terminology into the phrase "Buyer's  
5 termination of or withdrawal from" an Assumed Plan. Docket No.  
6 172 at 25:20-21.

7 The Speyside Defendants counter that this section merely  
8 states that Pacific Steel agreed it would be liable for its  
9 termination of its own participation in, or its own withdrawal  
10 from, any of the several benefit plans it had assumed in the  
11 transaction. This point is confirmed by the fact that, in May  
12 2019, the Pension Trust filed a proof of claim, based on its  
13 authority under ERISA §4201, asserting Pacific Steel owed it \$6  
14 million (calculated under ERISA §4202 and §4219 for time period  
15 2014 - 2018) resulting from Pacific Steel's "complete withdrawal"  
16 from the MEP which occurred when it ceased to operate in 2018 and  
17 filed its chapter 7 case in January 2019.

18 After considering their respective arguments, the court  
19 concludes that Pacific Steel's withdrawal liability arose when  
20 Pacific Steel withdrew from the CBA and stopped contributing to  
21 the MEP. Second Street's withdrawal liability arose during, and  
22 had accrued during, the time it participated in the MEP. It had  
23 fully accrued as of 2014 when it sold its foundry business to  
24 Pacific Steel; its payment was made contingent by operation of  
25 ERISA §4204. The Contingent Withdrawal Liability did not arise  
26 from Pacific Steel's termination of or withdrawal from any  
27 Assumed Plan; it arose from - it originated from - Second  
28 Street's participation in the MEP and remained contingent under

1 ERISA §4204's safe-harbor provision until the bond was canceled  
2 in December 2017. It did not *arise from* Pacific Steel's  
3 *withdrawal* from the MEP. Second Street was relieved of paying its  
4 own withdrawal liability in 2014 and would have been permanently  
5 relieved if the conditions for the §4204(a) exemption had been  
6 maintained for the five-year statutory period. However, in 2017  
7 when the bond was canceled, the §4204 exemption ended. The  
8 contingency was not removed by Pacific Steel's withdrawal from or  
9 termination of any Assumed Plan.

10 The Trustee and Second Street argue that Stipulation between  
11 Second Street, its Creditors' Committee, and the MEP shows that  
12 the Speyside Defendants' interpretation is wrong. Under the  
13 Stipulation, Pacific Steel's failure to post the bond by June 30,  
14 2015 is defined as a "Buyer Withdrawal." The Trustee and Second  
15 Street claim this Stipulation was served on Defendants and they  
16 failed to respond to contest this definition. They claim this now  
17 defeats Defendants' argument that Pacific Steel's withdrawal  
18 liability arose in 2019 when it filed bankruptcy and Second  
19 Street's seller withdrawal liability was "triggered" in 2014 when  
20 the sale took place and then became non-contingent in 2017 when  
21 Pacific Steel's bond was canceled.

22 The court does not find this argument compelling. First, the  
23 Speyside Defendants had no obligation to respond to the  
24 Stipulation or contest its provisions and they are not, in any  
25 sense, bound by it. The transaction documented by the APA had  
26 closed in August 2014 and Pacific Steel's (and Speyside's) active  
27 participation in Second Street's chapter 11 case had essentially  
28 ended. Second, the Stipulation was executed in connection with

1 obtaining the MEP Trustees' support for confirmation of the  
2 Chapter 11 Plan. If the bond had not been provided by the  
3 deadline, Second Street's withdrawal liability would have become  
4 an immediate liability and the MEP Trustees could have exercised  
5 their rights under the Deed of Trust. Confirmation of the Chapter  
6 11 Plan would have been in jeopardy if this had transpired. The  
7 definition in the Stipulation made sense for the context for  
8 which it was drafted but it is not binding on the Speyside  
9 Defendants and it is not helpful in the interpretation of the APA  
10 or the relevant provisions of ERISA. The Stipulation does nothing  
11 to advance the Trustee's and Second Street's case.

12 The Trustee and Second Street argue there are three  
13 indemnification provisions in the APA. Docket No. 172 at 21:8-13.  
14 This argument has no merit. If §2.03(b)(ii) and (b)(iii) are  
15 interpreted as broad indemnification provisions as they contend,  
16 this offends core principles of contract interpretation. First,  
17 it makes §7.10(a)(iii) meaningless. *Zalkind v. Ceradyne, Inc.*,  
18 194 Cal.App.4th 1010, 1027 (2011) (court is to give effect to all  
19 contract terms, and avoid rendering some meaningless). Second, it  
20 makes §7.10(a)(iii) superfluous or redundant. *Pauma Band of*  
21 *Luiseno Mission Indians v. California*, 813 F.3d 1155, 1171 (9th  
22 Cir. 2015) (court declines interpretation that would render a  
23 clause superfluous). Third, the more specific indemnity provision  
24 in §7.10(a)(iii) controls over the general provisions of  
25 §2.03(b)(ii) and (b)(iii) which are focused on an entirely  
26 different subject matter. Reading the APA as a whole, with each  
27 provision in mind, shows that this interpretation does not hold  
28 up. There are not three indemnification provisions in this APA.

1                   **E. ERISA §4204 and APA §7.10(a)**

2                   Under ERISA §4201, Second Street's sale of its foundry  
3 business to Pacific Steel would have been treated as a complete  
4 withdrawal from the MEP, making Second Street immediately liable  
5 for the \$27 million shown in the Pension Trust's proof of claim  
6 filed in Second Street's bankruptcy case. To avoid this result,  
7 the parties structured the sale to comply with ERISA §4204(a). In  
8 order to achieve this result, §4204 required the following:

9                   First, Pacific Steel had to contribute to the MEP for  
10 substantially the same number of "contribution base units" as  
11 Second Street had. §4204(a)(1)(A). Section 7.10(a)(i) stated  
12 "after the Closing Date, Buyer shall contribute" as so required.  
13 Pacific Steel made these payments while it operated. This is not  
14 in dispute.

15                   Second, Pacific Steel had to provide the bond payable to the  
16 MEP in the requisite amount and maintain it for a period of five  
17 plan years. §4204(a)(1)(B). Section 7.10(a)(ii) tracked the  
18 language of §4204(a)(1)(B). Pacific Steel timely obtained the  
19 bond in the required amount but did not maintain it for the  
20 requisite number of years. There is no dispute as to this. When  
21 the bond was canceled in December 2017, the §4204 exemption  
22 ceased to apply. There is no dispute as to this.

23                   Third, under §4204(a)(1)(C), the APA had to provide that,  
24 if the purchaser withdraws during such first 5 plan years,  
25 the seller is secondarily liable for any withdrawal  
liability it would have had to the plan with respect to the  
operations (but for this section) if the liability of the  
purchaser with respect to the plan is not paid.

26  
27                   Section 7.10(a)(iii) also tracked this language in its first  
28 sentence:

1 if Buyer ... withdraws [from the MEP] ... prior to the end  
2 of the fifth plan year ... and Buyer's liability [to the  
3 MEP] ... is not paid, then Seller shall be secondarily liable  
4 for any withdrawal liability Seller would have had [to the  
5 MEP] ... with respect to Buyer's operations during such  
6 five-year period but for Section 4204 of ERISA.

7  
8 However, §7.10(a)(iii) added the following sentence: "Buyer shall  
9 indemnify Seller and hold Seller harmless from and against any  
10 liability incurred by Seller pursuant to Section 4204 of ERISA  
11 and this subsection (iii)."

12 This last sentence of §7.10(a)(iii) is the focus of the  
13 parties' dispute. However, there are two other provisions of  
14 §4204 that inform the outcome of this dispute.

15 Section 4204(a)(2) provides that -

16 If the purchaser -

17 (A) withdraws before the last day of the fifth plan year  
18 beginning after the sale,  
19 and

20 (B) fails to make any withdrawal liability payment when due,  
21 then the seller shall pay to the plan an amount equal to the  
payment that would have been due from the seller but for  
this section.

22 There is also no dispute regarding the fact that Pacific Steel  
23 failed to make a "withdrawal liability payment when due" as shown  
24 by the \$6 million proof of claim filed by the MEP Trustees in  
25 this case. This section also indicates there remains a seller  
26 obligation.

27 Section 4204(b)(1) defines the amount of the purchaser  
28 liability as follows:

29 For the purposes of this part, the liability of the  
30 purchaser shall be determined as if the purchaser had been  
31 required to contribute to the plan in the year of the sale  
32 and the 4 plan years preceding the sale the amount the  
33 seller was required to contribute for such operations for

1       such 5 plan years.<sup>7</sup>

2       According to the Speyside Defendants, under §4204(a)(1)(C),  
3 Second Street had secondary liability for Pacific Steel's  
4 purchaser liability as defined in §4204(b)(1). They argue that  
5 the indemnification obligation imposed on Pacific Steel by the  
6 last sentence of §7.10(a)(iii) extends only to Second Street's  
7 secondary liability for that "five plan year" piece, not the  
8 entire \$27 million Contingent Withdrawal Liability. Docket No.  
9 176 at 30.<sup>8</sup>

10      The Speyside Defendants also argue that Second Street's  
11 secondary liability under §4204(a)(1)(C) - for which there is  
12 indemnification - only exists where Pacific Steel, as the buyer,  
13 withdraws while the §4204(a) conditions are still in effect.  
14 Here, the parties agree that the conditions for the §4204  
15 exemption ended in 2017 and there appears to be no dispute that  
16 Pacific Steel withdrew from the MEP months after that. The  
17 Speyside Defendants contend "since Pacific Steel never incurred a  
18 purchaser liability under §4204(a)(1)(C) by withdrawing when the  
19

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20      <sup>7</sup> See *Borden, Inc. v. Bakery & Confectionery Union & Indus. Int'l Pension*, 974 F.2d 528, 530 (4th Cir. 1992) (explaining background regarding ERISA rules for multiemployer plan withdrawal liability; for purposes of determining the purchaser's withdrawal liability at some time after the sale, the statute treats the purchaser "as if" it had been required to contribute to the plan in the plan year of the sale and the four preceding plan years in the amount that the seller was required to contribute, thus shifting primary liability from the seller to the purchaser).

21  
22  
23  
24  
25  
26      <sup>8</sup> They also point out that the indemnification only applies to liability incurred by Second Street "pursuant to §4204" and §4204 itself does not impose the seller liability on Second Street. The seller liability is based on ERISA §4201 and §4203.

1 exemption was in force, Second Street cannot be secondarily  
2 liable for any such *purchaser* liability (and cannot have *any*  
3 liability that Pacific Steel must indemnify)." Docket No. 176 at  
4 31:13-16; Docket No. 183, Goldowitz Report, ¶33-35.

5 The MEP counsel's June 2014 memo provided to Second Street  
6 and its Creditors' Committee supports this analysis. Docket No.  
7 180, Toral Dec., Ex. E, buyer has "no obligation to assume"  
8 Second Street's "full withdrawal liability under §4204, only that  
9 portion of it that relates to the last five years of operations."  
10 The Segal memo of March 2014 provided to Speyside as part of its  
11 due diligence process is in accord. Docket No. 181, Stone Dec.,  
12 Ex. 3, seller's unfunded vested benefits assigned to buyer are  
13 between \$3.4 million and \$11 million based on certain  
14 assumptions; noting there could be residual responsibility for  
15 seller. Jeffrey Stone, Speyside's lead negotiator in this  
16 transaction, confirms this was his understanding as well. Docket  
17 No. 181, Stone Dec., ¶6, explaining his understanding was that  
18 the APA's indemnification provision did not apply or extend to  
19 any withdrawal liability, contingent or otherwise, resulting from  
20 Second Street's operations pre-dating Pacific Steel's acquisition  
21 of Second Street's foundry business; ¶12, noting that if the  
22 exemption criteria were not met "Second Street would be liable  
23 for its pre-acquisition withdrawal liability..."<sup>9</sup>

24 The Speyside Defendants also argue that the plain meaning of  
25

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26 <sup>9</sup> Docket No. 174, Komorsky Dec., Ex. 35 (8/14/14 email Stone  
27 to Wessels) does not contradict this, it simply indicates  
28 awareness of calculations for seller's withdrawal liability and  
potential buyer's withdrawal liability.

1 the last sentence of §7.10(a)(iii) is that Pacific Steel agreed  
2 to indemnify Second Street for any liability that Second Street  
3 could have incurred pursuant to *both* §4204 and subsection (iii).  
4 Only one liability could meet that definition - Second Street's  
5 secondary liability for Pacific Steel's theoretical purchaser  
6 withdrawal liability that would arise under §4204 if Pacific  
7 Steel withdrew within five plan years.

8 The Trustee and Second Street have suggested that the last  
9 sentence of §7.10(a)(iii) should be read as "pursuant to §4204  
10 and/or this subsection (iii)" rather than "and this subsection  
11 (iii)." Docket No. 180, Toral Dec., Ex. B, hearing transcript  
12 40:19-25, suggesting "and" be read as "and/or." The court rejects  
13 this suggestion as it would amount to a significant change to the  
14 APA. The Trustee and Second Street also argue that the "and" in  
15 this sentence "reaffirms" that Pacific Steel will be liable for  
16 the Contingent Withdrawal Liability and the "going forward  
17 liability."<sup>10</sup> Docket No. 172 at 28:16-21. The court finds this  
18 interpretation untenable. The language "reaffirms" no such thing.

19 The Trustee and Second Street also argue that this last  
20 sentence was "plainly intended to cover the only two liabilities  
21 that could have been incurred" by Second Street - those in  
22 §7.10(a)(ii) and (a)(iii). Docket No. 172 at 27:22-27. Section  
23 7.10(a)(ii) does not impose a liability, it simply conforms to  
24 the requirement in §4204(a)(1)(B) that Pacific Steel maintain the  
25 bond for five plan years. They urge the court to interpret

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27 <sup>10</sup> The use of this vague terminology when ERISA provides  
28 definitions that cover this situation is not helpful.

1 "pursuant to §4204 and this subsection (iii)" as a reference to  
2 §7.10(a)(ii) because it "identifies §4204" and "embraces" the  
3 Contingent Withdrawal Liability. Docket No. 172 at 28:16-21.  
4 Section 7.10(a)(ii) "identifies" §4204 only in that tracks the  
5 language of §4204(a)(1)(B). Finally, they contend that unless  
6 "pursuant to Section 4204" is read as a reference to §7.10(a)(ii)  
7 it is rendered meaningless.

8 This interpretation defies common sense, ignores the  
9 language of these provisions, and is contrary to basic rules of  
10 contract interpretation. Saying §7.10(a)(ii) "embraces" the  
11 Contingent Withdrawal Liability is wishful thinking. By the last  
12 sentence of §7.10(a)(iii), Pacific Steel agreed to indemnify  
13 Second Street for any liability that Second Street could have  
14 incurred pursuant to *both* §4204 and subsection (iii). The only  
15 liability that meets that definition is Second Street's secondary  
16 liability for Pacific Steel's purchaser withdrawal liability that  
17 could have arisen if Pacific Steel withdrew within the five-year  
18 period while the §4204 exemption was in place.

19 The Speyside Defendants point out that the Chapter 11 Plan  
20 provided that only the Second Street Plan Administrator could  
21 object to the amount of the Local 164B Claim. Second Street  
22 Docket No. 535, Chapter 11 Plan, §VI. D. This weighs against the  
23 Trustee's and Second Street's argument that the Contingent  
24 Withdrawal Liability - upon which the Local 164B Claim is based -  
25 belonged exclusively to Pacific Steel.

26 The APA was signed in June 2014 and the Chapter 11 Plan was  
27 confirmed in June 2015. The court may consider the subsequent  
28 acts and conduct of the parties in order to determine their

1 intent. *Warner v. City of Los Angeles*, 2 Cal.3d 285, 296 (1970)  
2 (construction given by acts of parties with knowledge of contract  
3 terms before controversy arises). If the Contingent Withdrawal  
4 Liability were solely Pacific Steel's under the APA, as the  
5 Trustee and Second Street now contend, precluding Pacific Steel  
6 from being involved in resolving the actual amount makes little  
7 sense. In fact, Second Street has objected to the face amount of  
8 the Contingent Withdrawal Liability asserted by the MEP Trustees.  
9 Docket No. 180, Toral Dec., Ex. D, 12/28/17 MEP Trustees' default  
10 letter; Ex. H, 1/29/18 Second Street response to default letter  
11 disputing amount of the assessment.

12 After careful consideration of the parties' arguments  
13 regarding ERISA §4204 and §7.10(a)(iii) of the APA, the court  
14 concludes that §4204(a)(1)(C) only imposes a single liability  
15 subject to indemnification - Pacific Steel's purchaser liability  
16 calculated under §4204(b)(1). However, the obligation to save  
17 Second Street from its secondary liability for this purchaser  
18 liability would only exist if the §4204 safe-harbor conditions  
19 remained in place at the time Pacific Steel withdrew from the MEP  
20 in 2019. But these safe-harbor conditions had ended in 2017 when  
21 the bond was canceled. The indemnification provision in the last  
22 sentence of §7.10(a)(iii) only covers Second Street's secondary  
23 liability for this theoretical purchaser liability for which  
24 Pacific Steel was primarily liable. If Second Street had become  
25 secondarily liable to the MEP by statute, it could have sought  
26 indemnification from Pacific Steel by contract. The court finds  
27 the Speyside Defendants' interpretation of §7.10(a) far sounder  
28 than the Trustee's and Second Street's.

1                   **F. Estoppel Issues**

2                   The Trustee and Second Street argue that judicial and  
3 equitable estoppel apply in this case to preclude the Speyside  
4 Defendants from prevailing in their interpretation of the APA.  
5 Docket No. 172 at 15-20; Docket No. 195 at 6-10; Docket No. 205  
6 at 6-10. The Speyside Defendants contend that these estoppel  
7 theories have no merit. Docket No. 176 at 34-35; Docket No. 203  
8 at 33-35; Docket No. 208 at 13-15.

9                   Judicial estoppel is an equitable doctrine which the court  
10 has discretion to apply in certain circumstances. *New Hampshire*  
11 *v. Maine*, 532 U.S. 742, 750 (2001). In general, it may be applied  
12 where (1) the party's later position is clearly inconsistent with  
13 its earlier position; (2) a court has been persuaded to accept  
14 the party's earlier position; and (3) the party will derive an  
15 unfair advantage or impose an unfair detriment on the other party  
16 if not estopped. *Id.* at 751.

17                  The Trustee and Second Street argue the inconsistent  
18 position and court acceptance elements of judicial estoppel are  
19 present because Speyside's counsel asked to add language to the  
20 Bid Procedures Motion and the court approved the Motion. Docket  
21 No. 172 at 16:5-25, referring to counsel's email suggesting  
22 changes to Bid Procedures Motion and stating six times on one  
23 page that Defendants "took on" a \$27 million liability based on  
24 this added language. They claim the court accepted this  
25 "representation."

26                  The court finds this argument meritless. The Speyside  
27 Defendants' current interpretation of the APA is not clearly  
28 inconsistent with this language added to the Bid Procedures

1 Motion. Speyside suggested adding this language and Second  
2 Street's chapter 11 counsel agreed. This did not amount to a  
3 representation that was accepted by the court. While Speyside may  
4 have been a party in interest with respect to the Bid Procedures  
5 Motion, with a right to be heard under Bankruptcy Code §1109(b),  
6 the other Speyside Defendants were not and none of them were  
7 parties to the chapter 11 case in the true sense of the word. The  
8 added language simply stated what the MEP Trustees had said: The  
9 Contingent Withdrawal Liability was estimated at the time to be  
10 roughly \$27 million. The added language was purely descriptive;  
11 it does not provide "evidence of their affirmative misconduct" as  
12 the Trustee and Second Street claim. Docket No. 205 at 9:2-6.  
13 This language does not amount to a representation by Speyside  
14 that it "took on" the Contingent Withdrawal Liability and in  
15 approving the Bid Procedures Motion the court did not accept the  
16 Trustee's and Second Street's interpretation of this language.  
17 The Speyside Defendants' current position is not "clearly  
18 inconsistent" with a prior position. The Trustee's and Second  
19 Street's reliance on *In re CFB Liquidating Corp.*, 581 B.R. 317  
20 (Bankr. N.D. Cal. 2017), *aff'd*, 591 B.R. 396 (N.D. Cal. 2018) is  
21 misplaced on both the facts and the law.

22 The Trustee and Second Street next contend that Speyside  
23 will obtain an unfair advantage if its current position is  
24 accepted. They posit that the added language served to chill the  
25 bidding, and they claim it effectively did so because there were  
26 no other bidders. The court disagrees. There may have been many  
27 reasons why there were no other bidders. Their reliance on the  
28 deposition testimony of Jeffrey Stone as support for this

1 proposition is misplaced. Docket No. 172 at 17; Docket No. 174,  
2 Ex. 48, Stone Tr. 70-74.

3 The Trustee's and Second Street's argument for equitable  
4 estoppel is equally flawed. *City of Oakland v. Oakland Police and*  
5 *Fire Retirement Svs.*, 224 Cal.App.4th 210, 239-40 (2014) (listing  
6 four elements generally required). In the exercise of its  
7 discretion, the court declines to apply either estoppel theory  
8 here.

9 **III. Conclusion**

10 For the foregoing reasons, the court grants summary judgment  
11 in favor of the Speyside Defendants as to the second, seventh,  
12 eighth, ninth, eleventh and fourteenth claims for relief stated  
13 in the First Amended Complaint. The Speyside Defendants have  
14 shown there are no genuine issues of material fact as to the  
15 proper construction of the APA. Pacific Steel did not directly  
16 assume an obligation to pay the Contingent Withdrawal Liability  
17 and its indemnification obligation was limited as the Speyside  
18 Defendants contend. As a matter of contract interpretation they  
19 have negated an essential element of the Trustee's case: that the  
20 APA required Pacific Steel to indemnify Second Street for its  
21 Contingent Withdrawal Liability or that the APA required Pacific  
22 Steel to assume the Contingent Withdrawal Liability. Accordingly,  
23 the court denies the Joint Motion of the Trustee and Second  
24 Street. The court requests that the Speyside Defendants submit an  
25 order conforming to this decision.

26 The court also notes that this ruling provides a basis for  
27 granting the pending motion for summary judgment by UHY, LLP as  
28 it effectively disposes of the aiding and abetting breach of

1 fiduciary duty claim asserted in the FAC against UHY, LLP. The  
2 court requests that UHY, LLP submit an order conforming to this  
3 decision.

4 The court will hold a status conference regarding resolution  
5 of the remaining claims in the First Amended Complaint and the  
6 pending motions at 11:00 a.m. on September 29, 2022. The parties  
7 shall submit status conference statements explaining their views  
8 on resolution of the remaining claims in this adversary  
9 proceeding at least seven days before the status conference.

10  
11 \* \* \* \* **End of Memorandum Decision** \* \* \* \*

1    Court Service List  
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